Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1463

APRIL INDUSTRIES, INC.,
Petitioner,

vs.

HAROLD O. BJORK; HERMAN A. BJORK; BEATRICE A. WILCOX and ARTHUR ANDERSON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF CASE

Respondents do not disagree with petitioner's statement of the case. The statement fails to comply, however, with Rule 23 1(f) requiring that the statement of the case shall set forth:

> ...the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them ...and the way in which they were passed upon by the court; such pertinent quotations...as will show that the federal question was timely and

properly raised so as to give this court jurisdiction...

ARGUMENT

A. Petitioner Did Not Comply With Rule 23

Petitioner's failure to comply with Rule 23 1(f) should result in dismissal of the petition, since petitioner has not shown that any federal question was timely and properly raised in both the court of first instance and the appellate court.

B. There Are No Special Nor Important Reasons For This Review

Rule 19 provides that the writ shall be granted only if there are "special and important reasons therefor," and gives as an example a situation in which the state court has decided a "federal question of substance not theretofor determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." There are no such factors present.

C. There Is No Double Recovery

Petitioner's contention is that there has been a lack of due process because respondents have had a double recovery. Petitioner argues that there was a double recovery because the court ordered petitioner to make restricted shares of stock freely tradeable and also awarded damages for failure of petitioner to have made the shares tradeable while they still had substantial value.

The simple response to such contention is that in computing the award the full value of freely tradeable shares, as of the time of the award of damages, was subtracted from the value of the shares as of the time they could have been sold had petitioner performed its agreement to make respondents' shares tradeable.

Petitioner's "double recovery" contention fails, just as a matter of logic. Had there been no deduction of the value of the shares as of the judgment date, in the computation of damages, petitioner then would have a logical argument. Petitioner elides the deduction of the full value of the shares as of the judgment date by saying that the amount awarded was "virtually equivalent" to the amount respondents would have received had they been able to sell shares at the time of the public offering, as agreed. The only reason the amount awarded was "virtually equivalent" to the price at which they should have been able to sell, was that the shares had dropped in value to "virtually" nothing. At the time of the judgment, the market price had dropped from $12.75 to 87½ cents. Nevertheless, the remaining full value of tradeable shares, 87½ cents, was deducted in the damage computation.

A well established rule in equity is that the court is not limited to the granting of specific performance, but may also award damages if necessary to give complete relief.[1] Petitioner would have this

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1. Northeast Theatre Corporation v. Wetsman, 493 F.2d 314; Annotation 95 A.L.R. 228; Restatement of Contracts, §384; 71 am. Jur.2d, Specific Performance, §216.

court believe that, not only is that an improper rule but also that it even violates the due process clause.

Here respondents were awarded specific performance of the agreement that they should get unrestricted stock and were also awarded damages for having been prevented from selling the stock because it had not been made tradeable. Those awards are not inconsistent.

There is no more double recovery here than there would have been had the stock only declined slightly, and an amount in damages much less than the full value of the shares had been awarded. So long as the actual value of the shares at time of judgment was deducted, whatever it may have been, there is no double recovery.

The double recovery contention was clearly and succinctly treated by the Utah Supreme Court and rejected. The court stated:

> As to the claim of double damages, there is no merit at all. Had the court awarded the full value of the stock at its highest market value without deducting its present value, then by leaving the stock with the plaintiffs, there would be an improper recovery. However, by finding the value at which the stock would have been sold except for the restriction and deducting its value on the day of the decision of this Court, the resulting figure would be the actual damage sustained by the plaintiffs.

The agreement with the appellant was two-fold: (1) to remove the restrictive legend, and (2) to include plaintiffs' stock in the public offering. The order of the court that the restrictive legend be removed was properly made, but that order by itself would not make the respondents whole for they sustained a huge loss in not being able to sell their stock while the price was high. The respondents are entitled to the damages occasioned by the breach of the agreement to include their stock in the public offering.

The value of the stock on March 12, 1976, as shown by the evidence, was the value of such stock without a restrictive legend on it. It is rather obvious that stock which cannot be sold would have small or no market value. By deducting the value of stock without a restriction of sale from the highest price of the stock would require that the restriction be removed when the stock is kept by, and its value charged to, the respondents. There was no duplication of damages in this case, nor was the judgment inconsistent in its provisions.

CONCLUSION

The Petition for Writ of Certiorari should be denied because:

(a) there is no showing that any constitutional question was raised properly in the state proceedings;

(b) there is no "important federal question" involved; and,

(c) there has been no double recovery and thus no violation of the due process clause of the constitution.

Respectfully submitted,

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